

## PATENT APPLICATION

### **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

APPLICANT(S) : Craig Allan Dunk  
APPLICATION NO. : 10/787,201  
TITLE : SYSTEM AND METHOD FOR DELIVERY OF PACKETS  
FILING DATE : February 27, 2004  
EXAMINER : HAILU, Kibrom T.  
GROUP ART UNIT : 2416  
ATTORNEY DOCKET NO. : P1646US00  
CUSTOMER NO. : 63617  
CONFIRMATION NO. : 4692

Commissioner for Patents  
Mail Stop Amendment  
P.O. Box 1450  
Alexandria, VA 22313-1450

### **PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Sir:

Applicant requests review of the non-final rejection of November 18, 2008 in the above-identified application. This request is being filed with a Notice of Appeal, and no amendments are being filed. Claims 1-38 are pending in the application. Claims 1, 10 and 16 are independent.

### **Claim Rejections - Obviousness**

Claims 1, 3, 10, 12, 16-22 and 28-32 have been rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Publication No. 2004/0258039 (Stephens), U.S. Patent No. 7260392 (Kitchin) and U.S. Patent No. 7289453 (Riedel). The remainder of the claims are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references in various combinations with U.S. Patent 6912387 (Haas), U.S. Publication No. 2004/0151136 (Gage), U.S. Patent No. 5682460 (Hyziak) and U.S. Patent No. 6771594 (Upadrasta).

### **Issues**

Applicant's request for review centres on the Examiner's incorrect application of the Stephens and Kitchen references. Stephens is cited for all the features of claim 1 except, "repeating said transmitting step until said transmitting step fails." Applicant and the Examiner are fully in agreement that this feature is lacking from Stephens. The Examiner relies on Kitchen for this feature, but fails to provide the requisite rational underpinning in support of the combination of Stephens and Kitchen. Of note, the Examiner has failed to address Applicant's repeated arguments that Stephens teaches against such a combination, or any other combination that would provide Stephens with the above feature. The Examiner has also provided no evidence that the alleged benefits of the combination stem from the above feature. Applicant therefore submits that the claims are not obvious.

### **Detailed Arguments**

The Examiner's reasoning in support of the combination of Stephens and Kitchen involves reintroducing the very problem Stephens attempts to solve. Applicant submits that this clearly does not provide an adequate rational underpinning in support of the combination, and that a person skilled in the art would in fact be decisively led away from combining Stephens and Kitchen by the teachings of Stephens.

Stephens discloses two transmit modes. These are of significant relevance in spite of the Examiner's statement to the contrary at page 3 of the Office Action, as will be made clear shortly. In the first mode, a continuous data burst is transmitted, without any pausing or retries. In the second mode, a first portion of a transmit opportunity (TXOP) is allocated for a data burst, and a second portion is allocated for retries. The second portion, according to Stephens, "may allow the system, in some cases, to detect acknowledgements for any sent packets, and then send any necessary retries during this same TXOP". The TXOP is divided

into the first and second portions based on the probability of transmission failure, which depends on channel condition. If channel condition is good, the second portion will be smaller, as less retries are anticipated. The entirety of Stephens' contribution to the art rests on not waiting for acknowledgement after each packet is sent, and instead continuously sending and then dealing with failures later if time permits.

The relevance of Stephens' transmit modes will now be made apparent – both modes attempt to fit more packet transmissions into a given period, to make the “best possible use of each channel access” (Stephens, para. [0011]). This is accomplished by deliberately not waiting to detect failures. That is, Stephens teaches directly against the implementation of a “stop and wait” process as described at page 6 of the Office Action and paragraph [0020] of Applicant's description, regardless of whether such a process is found in Kitchen or elsewhere. Waiting for acknowledgement after every packet would prevent Stephens from achieving a higher data throughput, and in doing so would destroy Stephens' entire contribution to the art. In fact, the Examiner admits as much, reciting at page 4 of the Office Action, “the problem with this kind (continue transmission of packets until failing) of delivery of packets is that the source has to wait for some time until it receives acknowledgement.”

In addition to failing to address Applicant's previously submitted arguments similar to the above, the Examiner also recites, at page 7 of the Office Action, several apparent benefits of the combination of Stephens and Kitchen. Applicant notes that Kitchen is only used in the combination to provide the feature of “repeating said transmitting step until said transmitting step fails.” Therefore, even disregarding the above “teaching away” arguments, if any of the Examiner's recited benefits are to assist in providing a rational underpinning for the combination of Stephens and Kitchen, they must stem from the above-recited claim feature. The Examiner indicates at page 4 of the Office Action, in responding to Applicant's previous arguments, that the benefit of interest is the

provision of "reliable service that would guarantee the reception of packets." No elaboration is provided by the Examiner for any of the remaining benefits, and no evidence is provided that any of them would result from providing Stephens with the above-recited claim feature. Indeed, Stephens already makes allowances for anticipated retries to "guarantee the reception of packets" as described above in relation to the two transmit modes.

In summary, the Examiner asserts that it would be obvious to apply Kitchen to Stephens, but does not address the fact the Stephens clearly teaches away from such a combination. The Examiner also does not provide adequate support for the combination, even notwithstanding Stephens' teaching. The rational underpinning required to support the Examiner's finding of obviousness is therefore not present.

Claims 10 and 16 contain similar limitations, and all remaining claims depend on one of claims 1 and 10. For at least the foregoing reasons Applicant therefore traverses all prior art rejections.

### **Claim Rejections – Lack of Support**

Claim 16 has been rejected under 35 U.S.C. 112 as being unsupported by the description. In response to Applicant's arguments, the Examiner has merely reproduced an earlier assertion that "it does not matter whether it is well known or not, it must be clearly described in the specification." The Examiner appears to be incorrectly equating the requirement for a "clear" description with a requirement for verbatim support. Claim 16 is in fact supported both implicitly by the description and explicitly by the originally filed claims.

The Manual of Patent Examining Procedure (MPEP), at section 2163-I and 2163-I-B respectively, reads as follows:

"...original claims constitute their own description..."

"...there is no in haec verba requirement ... claim limitations must be supported in the specification through express, implicit, or inherent disclosure."


From the above and from 35 U.S.C. 112 it is clear that: 1) the description must allow a person skilled in the art to make and use the invention; 2) originally filed claims are self-supporting; and 3) verbatim support is not a requirement.

Therefore, what is well known in the art necessarily matters, as the knowledge of a person skilled in the art may determine what is implicit and what is not. Something may be implied to a person skilled in the art that would not be implied to an unskilled person lacking knowledge to notice the implication.

Applicant submits that explicit support is provided for claim 16 by the originally filed claim 16. Further, support is provided at least by paragraphs [0015] and [0017] which describe a packet manager including software objects and executing on a client machine. Client machine 34 is described at paragraph [0012] as being "based on the computing environment and functionality of a wireless personal digital assistant." In that well-known computing environment, applications are provided by sets of instructions contained in computer-readable storage media, and are executed by processors (for example, see Figure 2 of U.S. Patent No. 5682460 (Hyziak) cited by the Examiner). Claim 16 is therefore supported explicitly by the originally filed claims, and implicitly by the description.

In view of the above arguments regarding both obviousness and support issues, reconsideration and allowance of the subject application are respectfully requested.

Respectfully submitted,



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